

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0074

BETWEEN:

SCOTT BEGG
ADRIENNE HENNESSY

CLAIMANTS

AND

PARK BAY VILLAS LIMITED

DEFENDANT

Appearances:

Mr. Richard Williams with Ms. Danielle France for the Claimants

Mr. Duane Daniel with Ms. Jenell Gibson and Ms. Chanté Francis for the Defendant

Mr. Scott Begg representative of the Claimants

Mr. Peter Jeffe representative of the Defendant

2020: 3rd November
4th November
2021: 19th January
20th January
30th April

RE-ISSUED JUDGMENT

Byer, J.:

- [1] Everyone wants to buy a piece of the idyllic Grenadines, but when one party refuses to complete the sale for that little piece of the rock, parties become entrenched in their positions and the court has to ultimately determine which position falls within the parameters of the law and who will succeed. This case was one such instance.

Background

- [2] Park Bay House (hereinafter referred to as “PBH”) is a property situate in Bequia, St. Vincent and the Grenadines which is owned by the defendant in this matter. PBH was operated as a short term rental property.
- [3] PBH was advertised for sale through The Grenadines Collection for the price of US\$695,000.00. In 2017 the claimants expressed an interest in purchasing PBH and negotiated with the defendant to purchase the property and its contents for the total sum of US\$600,000.00 – US\$100,000.00 being the price for the furniture and contents and US\$500,000.00 being the price of the property.
- [4] The parties entered into an Agreement for Sale dated 21 April, 2017. Clause 2. i. of the Agreement provided for the payment of a First Deposit of US\$80,000.00 on execution of the Agreement upon satisfactory inspection of the property before 14 April 2017. The claimants conducted this inspection between 12 April 2017 – 21 April 2017.
- [5] The Agreement for Sale was executed on 21 April, 2017 and the First Deposit of US\$80,000.00 was paid to the defendant on 28 April, 2017.
- [6] Between 28 September 2017 – October 2017, the claimants complained of leaks and termites at PBH. Between October 2017 – November 2017 the defendant engaged the services of Flick Pest Control for the purpose of treating the property for termites and also engaged Tennon Construction to effect roof repairs to address the leaks. The claimants also raised complaints about the satellite internet and the defendant also engaged the services of Mr. Craigg Gooding to address these concerns.
- [7] The claimants visited Park Bay House from 6 December 2017 to 14 December 2017.
- [8] Pursuant to Clause 2. ii. of the Agreement, the claimants paid the second deposit of US\$60,000.00 in or around January 2018.
- [9] On 24 April 2018 (a week before the closing date) the claimants indicated through their legal practitioner, Mr. Richard Williams that the property was in such a state and condition that they regarded it as amounting to a breach of contract and were unwilling to complete the sale. The claimants also alleged that there was misrepresentation by the defendant about the inclusion of a non- potable well.
- [10] By letter from the claimants’ legal practitioner dated 2 May 2018 the claimants purported to rescind the Agreement for Sale and demanded the return of the first and second deposit.
- [11] The claimants brought a claim against the defendant on 18 May 2018 seeking primarily the following reliefs:
 - (i) A declaration that the Agreement has been rescinded;
 - (ii) Return of the First and Second Deposit;

- (iii) Interest on the deposit total US\$5,128.00 (or its EC equivalent of \$13, 787.15) at the date of this Claim Form and continuing at the daily rate of US\$13.15 (or its EC equivalent of \$35.35)
- [12] The defendant filed its defence and counterclaim on 28 June 2018 contending that the claimants are not entitled to a return of the deposits and seeking the following reliefs:
- (i) A declaration that the claimants are in breach of the Agreement dated 21 April 2017.
 - (ii) An injunction restraining the Escrow Agent from paying the sum of US\$60,000.00 representing the Second Deposit to the claimants.
 - (iii) An order compelling the Escrow Agent to pay into Court the sum of US\$60,000.00.
 - (iv) Forfeiture of the First Deposit, the sum of US\$80,000.00.
 - (v) An order that the Escrow Agent pay to the defendant the Second Deposit, the sum of US\$60,000.00.
 - (vi) Forfeiture of the Second Deposit, the sum of US\$60,000.00.
 - (vii) Interest.
- [13] At the trial of the matter and at pre- trial review, it was clear to the court that the issues to be determined by the court were as follows:
- (i) Whether the defendant was liable for misrepresentations and if there were misrepresentations, whether it was open to the claimants to seek rescission or whether they were barred from so doing.
 - (ii) On the counter claim the defendant raised the issues of whether the claimants were liable to the defendant for breach of contract in failing to complete the sale and if so, if the defendant is therefore entitled to forfeit the deposits as paid.
- [14] The issues are therefore as follows:
- i. Whether the defendant is liable to the claimants for misrepresentation
 - ii. If there was misrepresentation, are the claimants, barred from relying on the same to avoid the contract for sale on the basis that they had affirmed the contract
 - iii. Are the claimants entitled to rescission for alleged defects in the physical structure of the property
 - iv. Whether the claimants are liable to the defendant for breach of contract for failing to complete the Agreement for Sale
 - v. Whether the defendant is entitled to forfeit the deposits paid for such failure on the part of the claimants.
- [15] For the sake of clarity, since the second named claimant has not in any way participated in the trial of this matter, when reference is made to the claimant in this judgment with regard to the provision of evidence, it shall refer to the first named claimant Mr Scott Begg.

Issue #1: Whether the defendant is liable to the claimants for misrepresentation.

- [16] The impetus for the claim of the claimants in seeking a repayment of the deposits as paid on the sale of PBH was based on the contention that not only had the defendant breached the contract (which will be examined later in this judgment) but fundamentally that the defendant had misrepresented the existence of certain facts which in the claimants' case had induced the claimants to enter into the contract.

The Claimants' Submissions

- [17] The claimants submit that the misrepresentation which was made by the defendant was accomplished through the marketing material posted on the website of the real estate agent Grenadines Island Villas.
- [18] By this marketing material, the claimants state that the defendant by its agent, offered for sale PBH with a well that provided non potable water to the property for the purpose of flushing toilets.
- [19] The submission of the claimants was that this well was of such importance to the claimants that upon the inspection in April 2017 of the property, the first claimant insisted upon a warranty being given by the defendant that since he had been unable to inspect the well and its system. By this warranty the first claimant was ensuring that the same was in working order by the time of completion.
- [20] The claimants submit that the defendant, fully aware that there was no existing well on the property however purported to issue a warranty that the well and the pump would be maintained in working condition until completion.
- [21] It is this representation that the claimants submit induced the claimants into the contract and it mattered not whether the representation was innocent or deliberate.
- [22] In the submission of the claimants it was therefore not important whether this representation was the sole reason the claimants entering into the contract as long as it materially influenced the claimants to establish contractual relations with the defendant.
- [23] The claimants relying on the authorities provided pointedly submitted that it was always clear that the claimants viewed this secondary source of water supply was of great importance and since the well did not in fact exist, the claimants were getting something completely different to what they had bargained for with the defendant¹.
- [24] It is on the basis that this representation had been made which was false that the claimants therefore submit that they are entitled to rescission of the contract for sale.

¹ **Charles Hunt Ltd v Palmer** [1931] 2 Ch 287 per Clauson J

The Defendant's Submissions

- [25] The submission of the defendant on the other hand, clearly stated that in order for the claimants to rely on any statement as a misrepresentation, it must have been made by the defendant or his agents and that it must have induced the claimants to enter into the contract.
- [26] The first line of response to this by the defendant was that the contract into which the parties entered clearly had a clause that stated that the contents of the agreement as executed amounted to the entire agreement². The defendant therefore submitted that nothing that was contained in the advertisement could form part of the agreement unless specifically stated to do so by an amendment in writing by the parties³.
- [27] Further in order for the claimants to have been induced the statement must have materially influenced the decision of the claimants as purchasers. Thus, in the submission of the defendant, the statement itself must have been material to the purchase transaction. In that regard the defendant submitted that the entire statement relied on by the claimants made reference to a secondary means of water supply to the property. It not having been a main or only source, the defendant submitted that that clearly meant that the statement could not be of such importance to the transaction on the face of it.
- [28] Having said so, the defendant then submitted that even if the statement could not possibly be material, the court was required to consider whether the claimants were in fact influenced by the statement.
- [29] The defendant made it clear that the claimants were provided with survey maps and access to the property to inspect. Having done so, it was incumbent on the claimants as early as April 2017 at the stage of negotiation and inspection to make the requisite inquiries as to the situation and presence of the well. Having not done so, the defendant submitted that the existence or non-existence of the well was of no material importance to the claimants and could not have influenced them into the contract.
- [30] Additionally, the defendant submitted that not only did the claimants have the opportunity to inspect, they also hired their own expert Laun Leslie and it was his expert report that they relied on, not on any representations that may or may not have occurred prior to the contract. Finally, the defendant submitted on this issue that in any event by October 2017 the claimants knew, by the admission of the claimant at trial that they had been told that the well did not exist on the site of PBH. Once again if the presence of the well was of such importance, it was submitted by the defendant, that even at that date the complaint would have been made. In the final analysis the

² Paragraph 18 of the Agreement for Sale

³ **Intreprenuer v East Crown** [2000] 2 Lloyd's Rep 611 at 614

defendant submitted that the actions of the claimants did not support the contention that the presence of this well induced or could have induced the claimants to enter the contract⁴.

Court's Analysis and Considerations

- [31] The starting point for the court on this issue must be to determine what can amount to a misrepresentation. In the text Commonwealth Caribbean Contract Law, the learned authors⁵ made a clear differentiation between a contractual term and a mere representation. A mere representation in the opinion of the authors was one that is a "statement by which the parties did not intend to be bound but which nonetheless induced the contract."⁶ Therefore a mere representation is one that is: i) a fact, ii) made by one party to the other, iii) during negotiations leading to a contract, iv) which was intended to operate and did operate as an inducement to enter into a contract but v) which was not intended to be a binding contractual term. If such a statement turns out to be false it then amounts to a misrepresentation⁷.
- [32] Having thus set the definition of what is a misrepresentation the next logical step must be to look at the words complained of by the claimants that they say amounted to such a representation.
- [33] By agreement dated 8 October 2014 the defendant appointed Grenadine Island Villas (the real estate agent) as their agent to "list and/or otherwise market the property⁸" (herein after referred to as "PBH") By paragraph 6 of this agreement the defendant was to *inter alia* provide all information reasonably necessary or desirable go the Agent to market the property ...". Therefore, this court accepts as a fact that the defendant was to and did so provide the marketing materials as of the agreement in 2014.⁹
- [34] That marketing material as was provided to the real estate agents was a follows:

"Water Storage two tanks and underground well

The main cistern under the house has a capacity of 16k gallons according to the inspection performed by Glenford Stewart in 2005. There is also an above-ground tank in the back that is about 500 gallons. The owners have used that tank to hold non-potable water pumped from a well

⁴ The defendant under this issue also submitted that the claimants were not entitled to rely on any statements made by the defendants regarding other identified complaints of the non-working satellite internet service and the non-working electrical pump. However, these were not relied on as misrepresentations made by the defendant by the claimants to warrant rescission of the contract and as such this court will not consider the submissions made on these at this point even though the same were pleaded in the statement of claim as was filed on behalf of the claimants herein.

⁵ Gilbert and Maria Kodilinye

⁶ Ibid at page 142

⁷ Ibid at page 142

⁸ Agreement at page 160 TB

⁹ This fact was accepted by the defendant through its witness Peter Jeffe at trial.

on the property which is used to flush the toilets – one plumbing can switch to use either source for the toilets and this can really save on fresh water usage.”

In particular, the claimants complain that the materials contained this specific statement: “the owners have used that tank to hold non potable water pumped from a well on the property to flush the toilets...” It is these words that the claimants contend amounted to a misrepresentation.

- [35] Applying the criterion that has been identified as to the finding of a representation that is false, firstly there must be a statement of fact.
- [36] This court accepts that the statement does contain a fact, a fact that there was a well that provided non potable water to the property for which the owners could have used to flush toilets. When the statement is stripped bare that is what is said. This fact is indeed borne out by the evidence of Peter Jeffe when in cross examination he admitted that upon his occupation of PBH from his predecessor in title, that he found that a hole had been dug in the ground just above sea level with a pump to pump the water to the above ground tank, however that tank operated only by gravity feed and was slow and therefore he had found that a pump had been added. However, Mr. Jeffe definitively said, that when in occupation of PBH or otherwise rented, that water used to be obtained from that well but that access was lost since 2015. This is of note, as it must be considered that this loss of access was after the agreement had been made with the real estate agent. Thus, the marketing materials at the time of provision in 2014 would have been what pertained at the time.
- [37] Secondly, the statement must have been made by the other party to the contract. So, even though there is no evidence that it was the defendant who had personally made the representation to the claimants, it is clear to this court, that the representation had been transmitted through the advertisement placed on the website of the real estate agent. The claimants at trial during the cross examination of the defendant Peter Jeffe tried to have him agree that the real estate agent was his agent, a suggestion that he bluntly refused to accept. Additionally, the claimants in their submissions continued to refer to the real estate agent as the agent of the defendant, although they did not refer the court to any authority which would support such a contention. In any event the court is satisfied that the real estate agent was “simply the agent of the defendant for the purpose of passing on the [mis]representation to the [mis]representee.”¹⁰ Thus this court is satisfied that the defendant must be bound by what was stated in the marketing materials as laid out by the real estate agents. This is so even if the court accepts that by the time that the sale was negotiated that those facts would not have existed as the usage of the said well had come to an end, this had still been transmitted to the claimants.
- [38] That being said, this court is further satisfied that the information was certainly conveyed to the claimants during the negotiations leading to the agreement for sale. It was that statement that was contained in the marketing materials which were sent to the claimants by the real estate agent in

¹⁰ Chitty on Contract 32nd edition Vol 1 para 7-024; *Philmore v Hood* (1838) 5 Bing (N.C.) 98

July 2019¹¹. Therefore, the third element of the statement having been made during the negotiation stage of the sale process has been satisfied.

- [39] The highest hurdle that the claimants however must surmount without knocking it over in this regard is that the statement was intended to operate and did so operate to induce the claimants to enter the contract. The claimants categorically state that it did so induce them to enter the contract for sale however the court has not seen any submissions by the claimants substantiating that that was the intention of the defendant in this regard.
- [40] However what the court must also be satisfied of is that the claimants were included in that class of persons to whom the statement would have been directed. When one considers that the statement was contained in materials that would have reached all prospective purchasers, it is clear, that the claimants were in that class.
- [41] So the most important question must therefore not only be were in fact the claimants induced into the contract by this statement but also as an addendum was the statement one that was of such particular materiality that essentially the claimants would not have entered into the contract “but for” what was represented.
- [42] Therefore this court must consider what can amount to inducement and how that relates to materiality.

Inducement and Materiality of the Representation

- [43] The essence therefore of misrepresentation is that the statement that is complained of should operate on the mind of the person who claims that they relied on the same. As the court in the case of **Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc**¹² succinctly stated, “...the claimant must establish the causative impact of the representation on his decision. His essential complaint must be that he entered into the contract on the terms on which he did as a result of what he was told i.e., that had he not been told what he was told he would not have done so. If he would have entered into the relevant contract even if the representation had not been made, he has no valid complaint.”
- [44] However, even if a statement has been made, there will be no representation if the claimants did not rely on it but rather relied on his own judgment or survey. In the case of **Attwood v Small**¹³ the House of Lords examined such a particular set of facts when a purchaser claimed that he had been induced by what had been said by the vendor’s agent. Thus, the court in considering not whether the words had in fact been spoken by the vendor but more so on what the purchaser had said in response, the House considered the following words “*the proposal is made by us under the*

¹¹ Exhibit MG 1 to the Witness Summary of Maria Elena Glynn filed 27/9/19

¹² [2010] EWHC 1392 (Comm) per Clarke J at paragraph 180

¹³ [1835-42] All ER Rep 258

complete understanding that you will afford Mr. P Taylor every facility to ascertain the correctness of the representations that have been made to him respecting this property.” In the determination of the House, by the purchaser so making that statement, they had had the opportunity and took the opportunity of inquiring themselves and satisfying themselves as to the statements that were made. The House therefore found that there was no misrepresentation as there was no reliance.

- [45] Finally the statement that is said to have been relied upon must be material that is, that it was such a statement that could have influenced a reasonable man to enter the contract¹⁴.
- [46] All of that therefore being said, can any of these apply to the statement that was contained in the marketing materials about the well and the provision of non-potable water?
- [47] When this court considers the question of whether the statement induced the claimants, the court must consider the evidence of the claimant and the documentary evidence in this regard.
- [48] Under clause 9 of the Agreement for Sale entered into by these parties, there was clear provision for the claimants to inspect the premises:

*“9. The BUYERS shall be permitted to inspect the building structure, premises and cisterns etc in April 2017. If no objection is made in writing on or before the 30th day of April 2017 the condition of the premises shall be deemed to be accepted by the BUYERS in “as is” condition. In the event that the BUYERS find the structures premises or cisterns to be defective or of an unsatisfactory nature they shall be entitled to the return of the **First Deposit** and this Agreement shall be wholly cancelled.”*

- [49] The claimant in fact took advantage of this inspection and again by his own evidence he stated that he hired one Mr. Laun Leslie to undertake the inspection and produce a report. When the court examines that report, it is clear, that there was no mention of the well or a non-potable system, either that it had been examined or that it had not been examined and therefore there was nothing that could be said about it. The summary of what that inspection found is as follows:

“Park Bay House Inspection Summary of April 12 2017 inspection findings

Buyer inspected the property and structures at Park Bay House on April 12 together with Inspector Laun Leslie of St. Vincent and found the condition as follows:

- 1. Windows, doors, shutters and hardware show moderate to advanced degree of deterioration – condition accepted.*
- 2. Exterior decks and railings. Condition shows normal wear and tear for age and type. Condition accepted.*
- 3. Solar Electrical panels, batteries and transformers. System observed to be in good working order by buyer over 7 day usage period. Condition accepted.*

¹⁴ Chitty on Contract 32nd ed para 7-041

4. *As per Inspector Leslie, main building foundation shows no signs of cracks or major defects, structural framing and roof is absent of termite damage or rot, roof is secure and dry. Buyer observed same. Condition accepted.*
5. *As per Inspector Leslie, water catchment system and cistern is in good working order, fresh water plumbing and waste drainage systems functioning properly as designed. Condition accepted.*
6. *House contents including furniture, appliances and equipment all found to be in good condition for age and type. Condition accepted.*
7. *Satellite internet communication equipment was not in operation at time of inspection. Seller represents that system is operational and is simply down for maintenance and service will soon resume and be maintained through to act of sale. Buyer accepts seller's representation.*
8. *Auxiliary 500 gallon water storage tank and electric pump motor equipment. Was not operational at time of inspection due to season (main water tank full). Seller represents the equipment as functional and Leslie indicated same. Buyer accepts representation that this equipment will be operational at act of sale."*

[50] However in spite of all of this, the claimant maintained at trial upon amplification of his evidence that the existence of the non-potable water system was very important to him as he intended to reside in the property all year round and that it was in fact a selling point of the house for him. However, this court is hard pressed to accept that this was in fact what pertained.

[51] The court is satisfied that the claimants had every opportunity to inspect the property and ensure that this non potable water system was functional or if not functional, at the very least its location. There is no evidence before the court that this was done. Indeed, by the claimant's own admission during cross examination when he was in the house in April 2017 there was no issue regarding the supply of water and at that time he made no mention of what he believed was the alternate water supply system.

[52] This court considers therefore that the statement that was contained in the marketing materials was not material. It was clear that there was a proper and consistent water supply to PBH. The statement concerned only a very small aspect of the house and this court accepts that the statement would not have induced a reasonable man who would have been concerned with water supply generally.

[53] Having said so, this court must next consider whether in any event the claimants were induced to enter the contract by the presence of the statement. In this court's assessment, there is no evidence to substantiate the claim, on a balance of probabilities that the claimants would not have entered the contract for sale "but for" the representation¹⁵ made as to the presence of the non potable water system. In this court's mind there is not a scintilla of evidence that supports such a

¹⁵ Chitty on Contract 32nd ed paragraph 7-038

contention. In the case of **Raiffeisen Zentral Bank**¹⁶, the court put it this way “...since the representee must show that the representation was an inducing cause it will be relevant to ask what he would have done if no representation had been made to him since the answer to that question is likely to determine whether the representation was a **cause** of his contracting or only an **encouragement** to him to do so.” (My emphasis added).

- [54] In fact this court is fortified in this view based on two factors. Firstly, that it was clear that the claimants had hired a professional to carry out an inspection of the property. Nowhere in that inspection summary is there a mention of this alternate system of water supply. In this court’s mind, if this was indeed of such importance to the claimants at the time of the contract, this court accepts that this was certainly the first opportunity that the claimants could have raised the issue. The contention of the claimants that he did by seeking warranties from the defendant¹⁷ as to the non potable water system that the same would be in working order, is not the same in this court’s mind to ensuring that the same in fact exists. Secondly, even if the court accepts that the request for the warranty for the same to be in “working order” was sufficient to establish the importance to the claimants of the non potable water system, the court states that this was undermined by the very fact that by October 2017 the claimant was categorically told of the lack of access to the said well by Ray Leslie. The claimant did nothing and this court does not accept that the reason he did not raise it was because in October he had no right to raise issues, as this court accepts that it was also during that period that the claimant made a plethora of complaints about the leaking roof and termites.
- [55] Rather this court accepts on a balance of probabilities that the mention of the alternate water system in the marketing materials amounted to no more than an encouragement, “mere puff” or sales talk and did not induce the claimants into this contract. It is clear to this court that this was the position when it was clear that even after the claimant became aware of the non existence he did nothing. In this court’s mind there was no misrepresentation.

Issue #2: If there was misrepresentation, are the claimants, barred from relying on the same to avoid the contract for sale on the basis that they had affirmed the contract.

- [56] This court having determined that there was no misrepresentation that affected the mind of the claimants to enter the contract, there is no need for the court to examine whether in any event there was an affirmation of the contract by the claimants. This court therefore finds that the claimants would not be able to avoid the contract based on misrepresentation.

¹⁶ Supra at paragraph 190

¹⁷ Email correspondence sent to the attorney for the claimant dated 17th April 2017 page 237 TB 1

- [57] However the claimants have also sought to rely on physical defects in the structure of PBH. These defects they say are sufficiently substantial that they amount to a right of rescission. The next issue examines that claim.

Issue #3: *Are the claimants entitled to rescission for alleged defects in the physical structure of the property.*

The Claimants' Submissions

- [58] The claimants' submissions did not address this issue specifically but relied on the contractual obligation of the parties under the Agreement for Sale for the claimants to have undertaken a final walk through prior to closing.
- [59] Having conducted that walk through, the claimants' case is that the defendant had breached its obligations to maintain the house in the same condition that it was at the time of the contract.
- [60] The complaint of the claimants is that PBH had developed major issues with the roof, there was termite infestation, the satellite internet was still not working and parts of the septic tank were crumbling and overflowing and other general maintenance issues. The claimants relied on these to rescind the contract and demand the return of the deposits paid.
- [61] The claimants therefore submitted that the defendant as a result was in breach of their obligations and the contract could be rescinded on that basis.

The Defendant's Submissions

- [62] The defendant submitted that there was no obligation on them to disclose material defects on the sale of property, whether those defects are latent or patent. Once the defects were discoverable on inspection there was no right to rescind the contract.
- [63] Indeed the defendant submitted that when one examined the defects complained of by the claimants, it was clear that they all were patent defects that not only could have been discoverable upon a proper inspection but that more importantly, they were far from substantial to support a claim for rescission.
- [64] For the defects to have been substantial they needed to be of such a quality that it meant that the claimants would not have gotten what they had bargained for with the defendant¹⁸. The defendant has made it clear that in fact the claimants would have gotten what they had bargained for and the most that they could have obtained was damages or a reduction in the purchase price. That was however not pleaded and in any event the claimants had contracted for the sale of the house at a

¹⁸ **Shepherd v Croft** [1911] 1 Ch. 521

hugely reduced purchase price which would have taken in to account any loss suffered upon the repair of the said defects.

Court's Considerations and Analysis

- [65] By the Agreement for Sale as between the claimants and the defendant, the defendant had agreed pursuant to clause 10 to "...in the period between the date hereof and the completion date of the purchase and sale ...**not to do or permit** any act or **suffer or permit any omission** whereby the value of the Property might be diminished or seriously impaired." (My emphasis added)
- [66] As identified by the defendant in their submissions, from the manner in which the case at trial proceeded on the pleadings as filed and this court having seen the submissions of the claimants, it would appear to this court that this was the sole ground upon which the claimants now sought to rescind the Agreement for Sale with the defendant.
- [67] In addressing its mind to this issue therefore this court must consider whether the value of PBH had been diminished or seriously impaired and further what, if any, was the direct result of the acts or omissions of the defendant in the period between the signing of the agreement and the final walk through in 2018.
- [68] Indeed it is the determination of this issue that goes to the heart of the dispute as between these parties.
- [69] Having said so, it is clear, that the major source of contention between the parties was the state of the roof. The claimants have clearly indicated that the defendant "allowed" the roof to deteriorate to the point where in April 2018 at closing, the same needed to be replaced in its entirety. However, based on the evidence that was elicited in trial on cross examination of the claimant, it was clear that at the time of the signing of the agreement for sale, the state of the roof had already showed clear damage that had been documented by the real estate agent and to which the claimant agreed had been in the year 2017.
- [70] The claimants however asked this court to accept the evidence that by October 2017 as substantiated by his witnesses that the roof was almost falling apart. When the court considers the evidence firstly of Mr. Laun Leslie, it was clear that by October 2017, he already having given a report in April of that year that the roof was generally in good condition, now was issuing a report in an attempt to obtain the job to replace the roof. As a result, this witness was not in this court's mind in a position to give a satisfactory answer as to what could have caused the extensive deterioration he had noted some six months later. Mr Leslie's evidence was that the roof was gone beyond repair and that there was at that point no other option but to do a complete replacement and not to fix it as the defendant had purported to do. But it was indeed of significance that this same witness who had clearly stated in his evidence that the state of the roof was directly due to the proximity of PBH to the ocean.

- [71] Then there was Mr. Duane Arthur the other witness for the claimants. Mr Arthur, it must be noted in October 2017 was also vying for the contract to replace the roof. His evidence also was that having seen the roof at some point in April 2017, it was clear that the same had deteriorated by October 2017 and right up to April 2018. He however also made a statement which was of note. When he was asked in cross examination what his recommendations had been to the claimants, he said he would have replaced the roof with commercial grade roof sheeting but admitted not only that the present material was exactly that but that further once again the proximity to the ocean would have presented an issue regarding its maintenance in any event.
- [72] It is without a doubt that it is the evidence of these two contractors that led the claimants to the decision to seek rescission however this court must consider that both of these contractors clearly had as their best financial interest to suggest the complete replacement of the roof. This is not a fact that can be minimized and it is this fact that substantially lessens the weight of this evidence and any reliance that this court places on the same.
- [73] This court also has the evidence of Mr. Ken Picknell, a witness this court found to be straightforward to the point of unabashed bluntness. Mr. Picknell frankly told the court on cross examination, that his mandate, whatever his recommendation may have been, was to fix the roof and that it is what he did, warranting that work so done for a period of one year. His evidence was that when he was finished with the repair work that he had repaired the leaks to the best of his ability and by May 2018 he was able to say that there had been no further leaks.
- [74] When this court therefore weighs the evidence it is clear to the court on a balance of probabilities, that the state of disrepair of the roof alleged by the claimants had been grossly exaggerated.
- [75] The other major issue flagged by the claimants to invoke the right to rescind was what the claimants termed as termite damage. This was also contained in the correspondence that supported the contention of the claimants for rescission. However, when this court heard the evidence of the witnesses in this regard, this court is satisfied that like the issue of the roof and even more so the termite "infestation," was one that did not in fact exist, at all. On cross examination of the claimant it was clear that the termite trails that he relied on as to present infestation were in fact present at the time that the contract was entered into in April 2017 and that further that there was no indication of such infestation in April 2018 at the time that the contract was to be finalized. Indeed, it is clear from the evidence of the witnesses for the claimants Duane Arthur and Leslie Laun that the only time that any termites may have been sighted was in October 2017, after which the defendant once again responded and sent professional pest control agents to the property as was clear from the evidence of Rudolph Andrews. Mr Andrews' contention that there had been no infestation of termites at PBH in April/May 2018 remained largely unchallenged.
- [76] So in this court's mind there being no merit in what may have been considered the major complaints of the claimants, this court is unable to accept the claim of the claimants to seek to rescind the contract. If in this court's mind there was no deterioration of the roof or termite infestation how could the value of the property have diminished? The answer to that is, clearly that

it could not have been. In fact, it seemed to have been lost on the claimants that the diminution in the value of the property or it being seriously impaired was not a subjective test but an objective test.

- [77] This court recalls quite vividly the exchange between the claimant and counsel for the defendant in which the questions were asked as to diminution in value. In being asked to justify how he was able to rely on the clause in the Agreement for Sale that spoke to the obligation of the defendant¹⁹ and the diminution of the value of the property he had this to say:

"I did not exhibit an appraisal of this property in April 2017. I do not have an appraisal of the property in April 2018. I do not have any appraisals. ...I am not aware that there is a definition of value in the agreement as being diminished or seriously impaired...none of the words in the contract have been defined...it is not subjective as to what constitutes diminished value – it is for the court to determine."

- [78] It was however clear despite making this statement, that the claimants did purport to take a subjective view of the value being diminished or seriously impaired. When one considers that these claimants negotiated a purchase price of USD\$500,000.00, USD\$200,000.00 below the valuation of Franklyn Browne dated 4 May 2018²⁰ it is clear in this court's mind that there was no legitimate objective determination on the part of the claimants to rely on clause 10. Additionally, this court finds as a fact that the actions and/or obligations of the defendant under clause 10 only required them to refrain from acts that would cause a diminution in the value of the property. This court does not accept that there was any implied obligation to ensure or actively take action that would **maintain** the value of the property.

- [79] This court is satisfied that this defendant every complaint or concern raised by the claimants was addressed and addressed promptly. Again, it seemed to have been lost on the claimants that they had purchased or agreed to purchase the property "as is". That is, in this court's mind, in the condition that the claimants found the same and which was in this court's mind maintained by the defendant given the fact that the actual purchase price had been substantially less than the value of the property.

- [80] In fact the defendant's witness Peter Jeffe never hid the fact that PBH had issues and in particular issues with the roof. He had this to say in his witness statement:

"The condition of the metal roof sheeting at the time of the Claimants' acceptance of Park Bay House is of particular note, since it was nearing the end of its life and had areas of corrosion that would be apparent to any inspector... It is important to note that the rear of the house receives considerably greater sea blast than the front (which is nearest the ocean), since the prevailing winds blow spray into the rear of the property from crashing waves on the other side of the

¹⁹ Clause 10 thereof

²⁰ Exhibit PJ16 to the Witness Summary of Peter Jeffe filed 11/7/19 at page 345 TB 1

headland, whereas the front of the house is protected by vegetation. As a result, the metal roof sheeting toward the rear of the house was significantly more corroded than in other areas.”

He then added in cross examination that the roof was the main issue that the property was sold “as is” and that the only reason that he has now changed the roofing panels is because he would be marketing to persons who would not be buying “as is”.

[81] Therefore when this court assess the evidence that was elicited, this court is more than satisfied on a balance of probabilities that there was no breach of the obligations of the defendant under the Agreement for Sale and in particular clause 10 and that the claimants were not entitled to seek rescission on that basis.

[82] The other issues that were also raised by the claimants to lend credence to the claim for rescission, in this court’s mind did not amount to an omission on the part of the defendant that would have led to the diminution of value of the property to ground such a claim. As the defendant’s witness Mr. Jeffe stated in his witness statement, instructions had been given to fix the issues of the satellite internet and the non- functional water pump and he had never been informed that the same were not attended to by his caretaker Mr. Leslie or that there were still extant issues with regard to those matters. These statements were never challenged at trial and as such in this court’s mind his representations as to what transpired is accepted by the court. In this court’s mind, these were minor maintenance issues that should have been raised by the claimants beforehand affording the defendant an opportunity to address the same before the claimants took the aggressive decision to bring the contract to an end.

[83] I therefore do not find that the claimants were entitled to rescission, due to any existing physical defects of PBH. Having failed to therefore complete as required by the agreement for sale, the questions must now be, what is the legal position of the claimants vis a vis the defendant and what, if any, remedy is the defendant entitled to for the failure of the claimants to complete.

Issue #4: Whether the claimants are liable to the defendant for breach of contract for failing to complete the agreement for sale

Issue #5: Whether the defendant is entitled to forfeit the deposits paid for such failure on the part of the claimants.

[84] When this court considers the factual matrix that has been accepted by the court and the findings of this court in this judgment that the claimants are not entitled to rescind the contract there having been no breach of the obligations under the Agreement for Sale by the defendant, the natural corollary must be therefore that the claimants must now be in breach to the defendant.

[85] This court is indeed satisfied on a balance of probabilities that the defendant not having been in breach of any of its obligations under the agreement for sale, that the defendant would be entitled

to their remedy as provided for in the agreement for sale. The declaration sought by the defendant that the claimants are in breach of the Agreement for Sale is therefore granted.

[86] Further by clause 17 of the Agreement for Sale it is stated in clear terms that:

“In the event that the Government of St. Vincent and the Grenadines advises approval for the issue of an ALHL to the BUYERS but the BUYERS fail or neglect to proceed to complete the purchase by the completion date then the SELLERS shall be entitled as its **sole remedy** to forfeit both the First and Second Deposit and the ESCROW AGENT shall pay over the Second Deposit to the SELLER in accordance with its written instructions within three (3) days of his receipt of same.” (My emphasis added)

[87] The defendant has made it clear that they rely on this clause and by their counterclaim filed on the 18 June 2018, sought an order for the forfeiture of the first and second deposits as paid under the agreement for sale.

[88] In the case of **Soper v Arnold**²¹ the court held that “the deposit serves two purposes – if the purchase is carried out it goes against the purchase-money – but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.” In this court’s mind this must be entirely correct and that the payment of the deposit by the buyer must be seen as a guarantee for the completion of the contract²². Once, a party defaults, then compensation for the failure must be payable to the party not in default. Additionally, the parties had in any event contracted to that circumstance and this court finds that the claimants must be bound by that term of which they agreed.

[89] This court therefore finds that the defendant is entitled to the forfeiture of the first and second deposits and this court further orders that the escrow agent is to pay the second deposit to the defendant’s counsel within seven days of this order.

[90] This court is also of the view that the claimants having kept the defendant out of their monies on the filing of this action, the defendant is entitled to interest on the said sums and I so order that it be paid at the rate of 4% p.a.

²¹ (1889) 14 AC 429

²² **Howe v Smith** (1884) 27 Ch D 89

The court therefore orders as follows:

On the Claimants' claim:

1. The claim is dismissed in its entirety.
2. Prescribed costs to the defendant pursuant to Part 65.5 CPR 2000.

On the counterclaim:

1. The declaration that the claimants are in breach of the agreement dated 21 April 2017 is granted.
2. An injunction restraining the escrow agent from paying the sum of USD\$60,000.00 representing the second deposit to the claimants is denied.
3. Forfeiture of the first deposit in the sum of USD\$80,000.00.
4. The escrow agent is ordered to pay to the counsel for the defendant the second deposit in the sum of USD\$60,000.00 within seven days of today's date.
5. Interest at the rate of 4% p.a. from the date of the letter of the claimants refusing to complete to the date of this judgment and thereafter at the statutory rate until payment on that said sum. The said interest that has accrued will be paid by the claimant not the escrow agent.
6. Prescribed costs to the defendant pursuant to Part 65.5 CPR 2000.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar